Sitrac Corp Sdn Bhd & Anor v Dato' Syed Hamzah bin Syed Abu Bakar (deceased) (representative appointed, Syed Sazlee bin Syed Hamzah) & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO WA-22NCC-623–11 OF 2019
LIZA CHAN JC
23 DECEMBER 2021

Civil Procedure — Unless order — Failure to comply — Defendant failed to comply with order for discovery of documents within given time frame — Court issued unless order giving defendant further seven days to comply — Whether defendant's failure to obey unless order was deliberate, inexcusable and contumelious — Whether reason given by defendant for non-compliance was unacceptable to court — Whether court was compelled to strike out defendant's defence and enter judgment for plaintiffs under O 24 r 16(1) of Rules of Court 2012

The High Court had allowed the third defendant's application for discovery against the litigation representative of the first defendant ('D1') requiring him to produce within 14 days the following documents in his possession, custody or power: (a) medical reports and diagnosis on the mental state/capacity of D1 from a private medical practitioner ('Dr Soraya'), the Tengku Mizan Army Hospital and the General Hospital Kuala Lumpur ('HKL') and, where applicable, his history of dementia and treatment from 2017 till the present; (b) a declaration of trust that D1 had executed on 13 May 2016; and (c) documents evidencing D1's appointment of his previous solicitors to act for him in the instant action. The discovery application was made after Dr Soraya had testified midway during the trial that from her preliminary observations of D1, and based on what she was told by D1's son, D1 was suffering from some form of dementia from as far back as 2017 and was not in a condition to testify at the trial. Dr Soraya's testimony caused the plaintiffs and the second and third defendants ('D2' and 'D3') to amend their respective pleadings to claim that a court order which D1 had obtained on 21 May 2019 against D2 (in 'OS 131') — which adversely affected the plaintiffs and D3 and which Order was the very thing the plaintiffs sought to set aside in the instant action — was made at a time when D1 was mentally incapable of managing his affairs or instructing solicitors to act on his behalf and that this fact was deliberately concealed from the court in OS 131 as well as the court hearing the instant suit. Three days after D3's discovery application was filed, D1 passed away and his son was appointed as his litigation representative to continue with the proceedings. Since the deadline for D1's representative to produce the documents under the

A discovery order had expired, the court issued an 'unless order' giving him a final seven days to produce the documents failing which it would make whatever order was appropriate under O 24 r 16(1) of the Rules of Court 2012. Three days after the 'unless order' was issued, D1's representative produced the declaration of trust but not any of the other documents asked for. The B plaintiffs, D2 and D3 submitted that D1's representative's failure to fully comply with the discovery and unless orders was deliberate and contumelious and urged the court to strike out D1's defence and make the necessary consequential orders. D1's representative, on the other hand, submitted that apart from the declaration of trust which he had produced, the other C documents asked for in the discovery order did not exist and were not in his possession, custody or power. He said he wrote to the parties stated in the discovery order for copies of the medical reports and diagnosis on D1, but HKL replied that it had no medical records on D1, the Tengku Mizan Army Hospital failed to give any reply while Dr Soraya replied that if she was asked to D prepare a medical report on D1 she would require time to prepare one.

Held, striking out D1's defence and granting judgment to the plaintiffs:

(1) The plaintiffs' cause of action alleged that D1 had deceived the court E through deliberate and conscious concealment of relevant and material facts in obtaining the order in OS 131. The documents sought to be discovered by D3 were therefore relevant, necessary and crucial to determine the state of D1's mental capacity or incapacity when he took out OS 131 and when he instructed solicitors to defend him in this action F (see paras 23 & 35).

(2) The court needed to be guided by medical evidence through the documents sought in the discovery order as to whether there was substance in the allegation that D1 did not have the mental capacity to litigate as far back as 2017, and whether that fact was concealed from the G court in OS 131 as well as this court, which documents might lead to a train of inquiry to assist this court in determining the instant case with finality. At this stage of the proceedings, the court was only concerned that the plaintiffs', D2's and D3's allegations of D1's lack of mental H capacity in managing his affairs was not a trivial complaint. A serious question arose from Dr Soraya's evidence about D1's mental capacity and the court had a duty to determine at the earliest possible opportunity whether there was substance in the allegation in order to 'protect its own process' and not participate in what might be irregular proceedings I (see paras 25–26 & 41)

(3) The court did not accept the reasons proffered by D1's representative for not complying with the discovery and unless orders. Since the discovery order had been perfected, to now claim that the reports and diagnosis sought to be produced did not exist was too late and unacceptable. D1's

representative never said at the outset of the discovery proceedings that the documents asked for did not exist. His contention that he did not have the documents in his possession, custody or power on the basis that they never existed was not convincing to justify his non-compliance. It was imperative to note that in his affidavit in reply to oppose the discovery application, D1's representative did not say that the documents did not exist but instead contended that they were irrelevant or academic. And when arguments were made on whether the 'unless order' should be made, there was not a whisper that the documents did not exist (see paras 33 & 35–36).

(4) It was significant that no application was made for a stay of the discovery order. Without a stay, D1's representative abdicated his right to refuse to comply. Dr Soraya had offered to prepare a medical report, but not by the deadline of 7 September 2021. However, there was no response to her letter and D1's representative did not even seek an extension of time for compliance to, at least, demonstrate seriousness and sincerity on his part. The deadline for compliance was not extended by the court. The non-compliance was therefore inexcusable, intentional and contumelious. No extraneous circumstance prevented D1's representative from complying with the discovery and unless orders. The non-compliance gave rise to a substantial risk that it was not possible to have a fair trial (see paras 41, 45–46, 51 & 55).

(5) After considering the facts and circumstances of the case and applying the principles established by case law authorities, this court exercised its discretion under O 24 r 16(1) of the Rules of Court 2012 to strike out D1's defence and enter judgment for the plaintiffs, inter alia, on terms that: (a) D1 had obtained the order dated 21 May 2019 in OS 131 by fraud and/or dishonesty and the order was hereby set aside and OS 131 itself was struck off and/or set aside; (b) D1's filing of OS 131 was an abuse of process; (c) general damages against D1 be assessed and the assessed sum carry interest at 5%pa from the date of judgment till date of full payment; and (d) D1 pay costs as follows: RM75,000 to the plaintiffs, RM30,000 to D2 and RM40,000 to D3 (see para 58).

[Bahasa Malaysia summary

Mahkamah Tinggi telah membenarkan permohonan defendan ketiga untuk penzahiran terhadap wakil litigasi defendan pertama ('D1') yang memerlukannya mengemukakan dalam tempoh 14 hari dokumen berikut dalam milikan, jagaan atau kuasanya: (a) laporan perubatan dan diagnosis mengenai keadaan mental/kapasiti D1 daripada pengamal perubatan swasta ('Dr Soraya'), Hospital Tentera Tengku Mizan dan Hospital Besar Kuala Lumpur ('HKL') dan, jika berkenaan, sejarah demensia dan rawatannya dari 2017 hingga kini; (b) pengisytiharan amanah yang telah D1 laksanakan pada 13 Mei 2016; dan (c) dokumen yang membuktikan pelantikan D1 terhadap

peguam terdahulunya untuk bertindak baginya dalam tindakan ini. Permohonan penzahiran itu dibuat selepas Dr Soraya memberi keterangan ketika perbicaraan bahawa daripada pemerhatian awalnya terhadap D1, dan berdasarkan apa yang diberitahu oleh anak lelaki D1, D1 mengalami beberapa bentuk demensia sejak 2017 dan tidak dalam keadaan untuk memberi keterangan pada perbicaraan. Keterangan Dr Soraya menyebabkan plaintif dan defendan kedua dan ketiga ('D2' dan 'D3') meminda pliding masing-masing untuk mendakwa bahawa perintah mahkamah yang telah D1 perolehi pada 21 Mei 2019 terhadap D2 (dalam 'OS 131') — yang memberi kesan buruk kepada plaintif dan D3 dan Perintah yang merupakan perkara yang plaintif cuba ketepikan dalam tindakan ini — telah dibuat pada masa D1 tidak berupaya secara mental untuk menguruskan hal ehwalnya atau mengarahkan peguam untuk bertindak bagi pihaknya dan fakta ini sengaja disembunyikan daripada mahkamah dalam OS 131 serta mahkamah yang mendengar saman ini. Tiga hari selepas permohonan penzahiran D3 difailkan, D1 meninggal dunia dan anaknya dilantik sebagai wakil litigasi untuk meneruskan prosiding. Memandangkan tarikh akhir untuk wakil D1 mengemukakan dokumen di bawah perintah penzahiran telah tamat, mahkamah mengeluarkan 'unless order' memberinya tempoh tujuh hari terakhir untuk mengemukakan dokumen jika gagal ia akan membuat apa-apa perintah yang sesuai di bawah A 24 k 16(1) Kaedah-Kaedah Mahkamah 2012. Tiga hari selepas 'unless order' dikeluarkan, wakil D1 mengemukakan pengisytiharan amanah tetapi tidak ada dokumen lain yang diminta. Plaintif, D2 dan D3 berhujah bahawa kegagalan wakil D1 untuk mematuhi sepenuhnya penzahiran itu dan 'unless order' itu disengajakan dan menghina dan menggesa mahkamah untuk membatalkan pembelaan D1 dan membuat perintah berbangkit sewajarnya. Wakil D1, sebaliknya, berhujah bahawa selain daripada pengisytiharan amanah yang telah dikemukakannya, dokumen lain yang diminta dalam perintah penzahiran itu tidak wujud dan tidak berada dalam simpanan, jagaan atau kuasanya. Katanya, dia menulis kepada pihak yang dinyatakan dalam perintah penzahiran untuk salinan laporan perubatan dan diagnosis D1, tetapi HKL menjawab tiada rekod perubatan pada D1, Hospital Tentera Tengku Mizan gagal memberi sebarang jawapan manakala Dr Soraya menjawab bahawa jika dia diminta menyediakan laporan perubatan tentang D1 dia akan memerlukan masa untuk menyediakannya.

Diputuskan, membatalkan pembelaan D1 dan memberikan penghakiman kepada plaintif:

(1) Kausa tindakan plaintif mendakwa bahawa D1 telah memperdaya mahkamah melalui penyembunyian fakta yang relevan dan material secara sengaja dan sedar dalam mendapatkan perintah dalam OS 131. Dokumen yang ingin dizahirkan oleh D3 oleh itu adalah relevan, perlu dan penting untuk menentukan keadaan keupayaan mental atau ketidakupayaan D1 apabila dia mengeluarkan OS 131 dan apabila dia

mengarahkan peguam untuk membelanya dalam tindakan ini (lihat perenggan 23 & 35).

(2) Mahkamah perlu berpandukan keterangan perubatan melalui dokumen yang diminta dalam perintah penzahiran sama ada terdapat teras dalam dakwaan bahawa D1 tidak mempunyai keupayaan mental untuk melitigasi setakat 2017, dan sama ada fakta itu adalah disembunyikan daripada mahkamah dalam OS 131 dan juga mahkamah ini, yang mana dokumen mungkin membawa kepada rangkaian siasatan untuk membantu mahkamah ini dalam menentukan kes ini dengan muktamad. Pada peringkat prosiding ini, mahkamah hanya bimbang bahawa dakwaan plaintif, D2 dan D3 tentang kekurangan keupayaan mental D1 dalam menguruskan hal ehwalnya bukanlah satu aduan yang remeh. Persoalan serius timbul daripada keterangan Dr Soraya mengenai keupayaan mental D1 dan mahkamah mempunyai kewajipan untuk menentukan pada peluang seawal mungkin sama ada terdapat teras dalam dakwaan itu untuk 'melindungi prosesnya sendiri' dan tidak mengambil bahagian dalam prosiding yang mungkin tidak teratur (lihat perenggan 25, 26 dan 41).

(3) Mahkamah tidak menerima alasan yang dikemukakan oleh wakil D1 untuk tidak mematuhi penzahiran dan 'unless order'. Memandangkan perintah penzahiran telah disempurnakan, untuk kini mendakwa bahawa laporan dan diagnosis yang ingin dikemukakan tidak wujud adalah sudah terlambat dan tidak boleh diterima. Wakil D1 tidak pernah berkata pada awal prosiding penemuan bahawa dokumen yang diminta tidak wujud. Hujahannya bahawa dia tidak mempunyai dokumen dalam simpanan, jagaan atau kuasanya atas dasar bahawa dokumen itu tidak pernah wujud adalah tidak meyakinkan untuk mewajarkan ketidakpatuhannya. Adalah penting untuk diambil perhatian bahawa dalam afidavit jawapannya untuk menentang permohonan penzahiran itu, wakil D1 tidak mengatakan bahawa dokumen itu tidak wujud sebaliknya menegaskan bahawa ia tidak relevan atau akademik. Dan apabila hujahan dibuat sama ada 'unless order' perlu dibuat, tidak ada kata-kata bahawa dokumen itu tidak wujud (lihat perenggan 33 & 35–36).

(4) Adalah penting bahawa tiada permohonan dibuat untuk penangguhan perintah penzahiran itu. Tanpa penangguhan, wakil D1 melepaskan haknya untuk enggan mematuhi. Dr Soraya telah menawarkan untuk menyediakan laporan perubatan, tetapi tidak pada tarikh akhir 7 September 2021. Bagaimanapun, tiada maklum balas terhadap suratnya dan wakil D1 tidak meminta lanjutan masa untuk pematuhan, sekurang-kurangnya, menunjukkan kesungguhan dan keikhlasan di pihaknya. Tarikh akhir pematuhan tidak dilanjutkan oleh mahkamah. Oleh itu ketidakpatuhan itu tidak boleh dimaafkan, disengajakan dan

menghina. Tiada keadaan luar biasa yang menghalang wakil D1 daripada mematuhi penzahiran dan 'unless order'. Ketidakpatuhan itu menimbulkan risiko yang besar bahawa tidak mungkin untuk mengadakan perbicaraan yang adil (lihat perenggan 41, 45–46, 51 & 55).

(5) Selepas mempertimbangkan fakta dan keadaan kes dan menggunakan prinsip yang ditetapkan oleh autoriti kes undang-undang, mahkamah ini menggunakan budi bicaranya di bawah A 24 k 16(1) Kaedah-Kaedah Mahkamah 2012 untuk membatalkan pembelaan D1 dan membuat penghakiman bagi plaintif, antara lain, atas terma bahawa: (a) D1 telah memperoleh Perintah bertarikh 21 Mei 2019 dalam OS 131 melalui penipuan dan/atau ketidakjujuran dan Perintah itu dengan ini diketepikan dan OS 131 sendiri telah dibatalkan dan/atau diketepikan; (b) D1 memfailkan OS 131 adalah penyalahgunaan proses; (c) ganti rugi am terhadap D1 dinilai dan jumlah yang dinilai membawa faedah pada 5% setahun dari tarikh penghakiman sehingga tarikh pembayaran penuh; dan (d) D1 membayar kos berikut: RM75,000 kepada plaintif, RM30,000 kepada D2 dan RM40,000 kepada D3 (lihat perenggan 58).]

Cases referred to

Caribbean General Insurance Ltd v Frizzell Insurance Brokers Ltd [1994] 2 Lloyd's Rep 32, CA (refd)

Dato' Ting Check Sii v Galaxy Grip Sdn Bhd & Ors [2011] 1 MLJ 646, HC (refd)

Goddard Elliot v Fritch [2012] VSC 87, SC (folld)

Hytec Information Systems Ltd v Coventry City Council [1997] 1 WLR 1666, CA (refd)

IOI Loders Croklaan Oils Sdn Bhd v LK Freight Services (M) Sdn Bhd & Ors [2012] 3 MLJ 266, HC (refd)

Lim Eng Chuan Sdn Bhd v United Malayan Banking Corp & Anor [2013] 3 MLJ 161; [2013] 5 CLJ 425, FC (refd)

Lim Keong Yew & Anor v Tan Sri Lim Kok Thay & Anor [2017] 1 LNS 1791, HC (refd)

Lim Thian Hock @ Lim Thiam Hock v Lim Choon Hiok [2014] 9 MLJ 1, HC (refd)

Mah Sau Cheong v Tan Eng Chin [2022] 7 MLJ 121, HC (refd)

Masterman-Lister v Brutton & Co, Masterman-Lister v Jewell and another [2003] 3 All ER 162, CA (refd)

Md Amin bin Md Yusof & Anor v Cityvilla Sdn Bhd [2004] 4 MLJ 446, CA (refd)

Reiss v Woolf [1952] 2 All ER 112, CA (refd)

Sitrac Corp Sdn Bhd & Anor v Dato' Syed Hamzah bin Syed Abu Bakar (deceased) (representative appointed, Syed Sazlee bin Syed Hamzah) & Ors [2022] 8 MLJ 43; [2021] 1 LNS 1740, HC (refd)

Tan Kah Khiam v Liew Chin Chuan & Anor [2007] 2 MLJ 445, CA (refd)
United Malayan Banking Corp Bhd v Palm and Vegetable Oils (M) Sdn Bhd & Ors [1994] 3 MLJ 73, SC (refd)
Wan Salimah bte Wan Jaffar v Mahmood bin Omar (Anim bte Abdul Aziz, intervener) [1998] 5 MLJ 162, HC (refd)

Legislation referred to

Mental Health Act 2001
Powers of Attorney Act 1949 First Schedule
Rules of Court 2012 O 24 rr 7, 7(1) , 16, 16(1)

Lim Kian Leong (with Jessica Chong) (Lim Kian Leong & Co) for the plaintiff.
Mak Lin Kum (with Layyin Teh bt Hassan) (Syed Ibrahim & Co) for the first defendant.
Zuriatul Mida bt Nor Azmi (with Nor Syairah bt Sulaiman) (Companies Commission of Malaysia) for the second defendant.
Jeyakumar Palakrishnar (with Barry Boey Chee Wai) (Zahir Jeya & Zainal) for the third defendant.

Liza Chan JC:

INTRODUCTION

[1] This court on 25 August 2021 allowed the third defendant ('D3')'s application in encl 135 for discovery against the first defendant ('D1') and made an order against D1's representative for production of all the following documents that are in his possession, custody or power, in the form of exhibit to an affidavit and if not then in his possession, custody or power, when he parted with it and what has become of it within 14 days from the date of the order (encl 161):

(a) Dr Soraya Kunanayagam's medical report and diagnosis on the first defendant's mental state/capacity and matters in respect of his mental state/capacity;

(b) Tengku Mizan Hospital medical reports and diagnosis in regard to the first defendant's mental state/capacity and matters in respect of his history of dementia and treatment from 2017 till present;

(c) General Hospital Kuala Lumpur's medical reports and diagnosis in regard to the first defendant's mental state/capacity and matters in respect of his history of dementia and treatment from 2017 till present;

(d) D1's declaration of trust dated 13 May 2016; and

A (e) the warrant to act and/or any similar appointment of solicitors executed by D1 in relation to the appointment of D1's former solicitors, Messrs Thomas Phillip and Messrs Kanesalingam & Co to represent D1.

B **[2]** The reasons for allowing the discovery application, the background leading to the filing of this suit, the nature of the plaintiffs' suit have been set out in my first grounds of judgment — see *Sitrac Corp Sdn Bhd & Anor v Dato' Syed Hamzah bin Syed Abu Bakar (deceased) (representative appointed, Syed Sazlee bin Syed Hamzah) & Ors* [2022] 8 MLJ 43; [2021] 1 LNS 1740 ('the first grounds of judgment').

C

[3] This grounds of judgment is to be read together with the first grounds of judgment.

D BACKGROUND TO MAKING THE 'UNLESS ORDER'

[4] Pursuant to the order in encl 161, D1's representative was to file the affidavit and produce the documents within 14 days of the order ie by 8 September 2021.

E

[5] In the meanwhile, given the developments that have unfolded in the midst of trial through Dr Soraya's testimony, D3, the second defendant ('D2') and the plaintiffs respectively made an application to amend their pleadings, inter alia, claiming that that the impugned order obtained against SSM in OS F 131 may have been or was obtained while D1 was incapable of managing and administering his affairs and this was deliberately concealed from the court in OS 131 and this court.

[6] All three amendment applications were consented to by D1 on G 21 September 2021. On 21 September 2021, the non-compliance of the discovery order was into its 13th day. After hearing the parties, an 'unless order' in the terms as contained in encl 176 was issued ordering:

(a) that D1's representative is required to produce all documents as ordered H pursuant to the court order dated 25 August 2021 (encl 161) within a period of seven days from the date of the order; and

(b) should D1's representative fail to abide with the unless order within the required time period, the court may make an order under O 24 r 16(1) of the Rules of Court 2012.

I

[7] The 'unless order' made against D1's representative was to give him another seven days to ensure obeyance ie by 30 September 2021, after discounting the weekend of 25 and 26 September 2021. Trial was fixed to continue on 18 October 2021.

[8] Three days after the 'unless order' was made, on 24 September 2021, in purported compliance thereof, D1's representative through his solicitors filed and served an affidavit in encl 173 producing the declaration of trust dated 13 May 2016 as prescribed under para (d) of the court order in encl 161.

[9] On 29 September 21, D1's representative filed an application in encl 181 to strike out paras 17–20, and 21–25 of the reamended statement of claim ('SOC') or alternatively, para 20A be struck out, in the further alternative, the reamended writ and reamended SOC be struck out.

[10] During case management on 4 October 2021, directions were given for early hearing of encl 181 as trial was to continue on 18 and 22 October 2021. The period was shortened for exchange of affidavits and hearing of encl 181 was fixed for 15 October 2021. It was also directed that the hearing for non-compliance of the 'unless order' in encl 176 be heard on 15 October 21.

NON-COMPLIANCE OF 'UNLESS ORDER' — D3, PLAINTIFF AND D2'S SUBMISSIONS

[11] The plaintiff, D2 and D3 submitted that the non-production of documents required under paras (a), (b), (c) and (e) of encl 161 not only tantamounts to a substantial non-compliance of the court order but a blatant disregard thereof; there is wilful disobedience on the part of D1's representative to prevent, frustrate or derail the smooth administration of the court proceedings in order to hide evidence that are relevant and crucial to determine the state of D1's mental capacity or incapacity when taking out OS 131 and defending this action. It was further submitted that there was deception practised upon the court through deliberate and conscious concealment of the relevant and material facts on the part of D1 in OS 131. Counsel elaborated that given the manner in which proceedings have unfolded and the obvious involvement and influence of a third party Khoo Kiam Chong who has recently disclosed his alleged vested interest in the actions taken against the plaintiffs, D2 and D3, the failure on the part of D1's representative is intentional and a contumelious disobedience of the 'unless order'. It was further argued that D1's defence ought to be struck out and judgment entered for the following reasons:

(a) the failure to render discovery is not innocuous as contended by D1's representative but calculated to frustrate the determination of the following questions;

(b) whether D1was a person under disability and precluded from bringing an action, making a claim or defending himself in any proceedings except by his litigation representative;

A (c) whether D1 was incapable of managing and administering his affairs including making his rectification application to SSM and OS 131 through which the impugned order dated 21 May 2019 was obtained;

(d) D1's representative cannot be allowed to abuse the process of the court and take further steps in the proceedings until and unless obedience is B rendered to the 'unless order';

(e) D1's representative has acted in an indolent manner and failed to display conscientious efforts to give proper discovery despite the 'unless order'; and C

(f) there is grave concern that the refusal to comply with the 'unless order', gives rise to a real or substantial risk of affecting a fair trial.

D1'S SUBMISSIONS

D

[12] It was submitted on D1's representative's behalf that he has fully complied with encl 161 and the 'unless order'. In his affidavit in encl 173, it was averred that the documents sought to be produced in prayers a, b, c and e of encl 161 never existed; he had written to: (a) Hospital Kuala Lumpur; E (b) Hospital Gleneagles Kuala Lumpur; and (c) Hospital Angkatan Tentera Tuanku Mizan. These documents are not in existence/not in D1's representative's custody, possession or power. The letters dated 2 September 2021 to the three hospitals asked whether the hospital has prepared any 'medical and diagnosis reports' for the late Dato Syed Hamzah during his F treatment/consultation, and if so, whether the hospital could furnish a copy of the same. It was asserted that Hospital KL replied on 6 September 2021 to say there was no record of the patient; Gleneagles Hospital replied on 6 September 2021 through Dr Soraya that she was not previously asked to prepare any medical report for the patient but if a medical report is needed, she will need G time to trace the records and prepare one. Hospital Angkatan Tentera Tuanku Mizan did not reply which prompted D1's representative's solicitors to write on 23 September 2021 asking for 'existing medical and diagnosis reports'. As for item e of encl 161, the appointment of Messrs Kanesalingam was produced but not that of Messrs Thomas Phillip as D1's representative does not have in his H possession, custody or power any warrant to act.

[13] D1's representative's learned counsel, Mr Mak submitted that where an order for discovery has been made against the party to whom documents are sought to be produced ie, D1, the said party (D1) is only required to produce I documents which are in his possession, custody or power, or in a manner set out in O 24 r 7(1) of the Rules of Court 2012 ('the ROC 2012'). He further submitted that the documents sought to be discovered by D3 under prayers a, b, c and e of encl 161 have never been in existence. As such, D1's representative cannot be compelled, under O 24 r 7 to produce or create documents which are

not in existence relying on *Lim Keong Yew & Anor v Tan Sri Lim Kok Thay & Anor* [2017] 1 LNS 1791 (which was adopted in *Mah Sau Cheong v Tan Eng Chin* [2022] 7 MLJ 121). In this regard, there is no basis upon which an order can be made to compel D1's representative to produce documents which have never been in existence or in D1's possession, power or control.

THE APPLICABLE LAW AND FINDINGS BY THIS COURT

[14] An 'unless order' is an order of the court that directs a party to perform some process requirement by a specified date and states the consequences of transgression.

[15] An 'unless order', being a peremptory order of the court, must be adhered to and its non-compliance should automatically attract the penalty prescribed in the order — see *Dato' Ting Check Sii v Galaxy Grip Sdn Bhd & Ors* [2011] 1 MLJ 646 which followed the English Court of Appeal decision in *Reiss v Woolf* [1952] 2 All ER 112.

[16] The burden is on D1's representative as the defaulter, to explain and show that he had the intention to comply with the 'unless order' but something beyond his control prevented him from doing that.

[17] In the instant case, the terms of the 'unless order' are in plain terms (as produced in para 5 above) but there was a failure in complying with the same.

[18] Order 24 r 16(1) of the ROC plainly in the crystal clear language it is casts, empowers the court to dismiss an action, strike out the defence and enter judgment for non-compliance of the order for discovery.

[19] In the instant case, in exercising the discretion whether to enforce the 'unless order' by striking out the defence and enter judgment for the plaintiffs, the facts and circumstances of the breach and the explanation proffered by D1's representative must be closely examined.

[20] I find D1's representative's averments in his affidavit neither satisfactory nor acceptable that he is not aware of the existence of any medical reports and diagnosis referred to in para a to c of encl 161.

[21] It is my utmost respectful view that the necessary documents on the state of condition of D1 is relevant to this suit, particularly due to Dr Soraya's evidence and the issues arising from the pleadings filed.

[22] To recapitulate, after the plaintiffs closed their case, D1 could not attend court to give evidence in April 2021. A medical certificate was tendered on his behalf. Dr Soraya was then called to provide testimony on his condition, at the request of the court and with the agreement of all parties, which she did. It was then revealed that D1 had seemingly been showing signs of dementia from as far back as 2017. In her testimony, Dr Soraya suspected that D1 had dementia but a full examination was required to substantiate and confirm this diagnosis. Dr Soraya informed the court that tests were being conducted to establish D1's exact medical condition and that she was waiting for the outcome of the reports. I do not consider her evidence as hearsay evidence; she referred to medical records, tests done. The documents sought would enable the court to arrive at a just decision. An excerpt of Dr Soraya's evidence is produced:

> Soraya: Ok. When he came to see me, I had to start from the very beginning that the son, according to the son, the father had been very confused. And this started probably around 2017, where he presented forgetfulness. He wouldn't know the rooms in the house, he was misplacing house keys. Had a minor accident, and in 2017, he was seen by a psychiatrist at Tengku Mizan Hospital. And started on Aricept which was a medication that we used for dementia in patients with dementia. But the son had stopped it, stating that his father's condition had worsened. And thereafter, they did not have regular follow up with, I think the psychiatrist, not too sure about that. And then in 2018, the patient actually withdrew money which he then couldn't remember where he kept his money. And then in 2019, he left home at 05:00PM and didn't come back. His son had to lodge a police report and he was found, I think someone found him and he was taken to the police station. And the son managed to pick him up. Since then, there has been a gradual deterioration for the last two to three years, intermittently unable to recognise his son, frequently saying that he wants to go home. We are not sure where home is but we are assuming that he is stating his old term memory which is maybe in Alor Setar. He doesn't do his prayers and he forgets to pray.
>
> He sleeps most of the day, he's unable to recognise his bedroom or where the toilet is in the house that he actually lives. And the son will have to actually guide him to the toilet. He also may forget that he has actually eaten, he occasionally gets agitated during the evening or at night. We are unsure whether he has any hallucinations or detri of visual. But he may be occasionally verbally abusive towards his son when he is agitated but never physically abusive. When, this was the history from the son that I got. When I saw the patient, patient, it was quite difficult to get him to come inside into my clinic. That my nurse and myself had to go out and persuade him to come in, he stated that he was quite fine and that he didn't need to come in. And that, so we try to say 'ok, just come in to listen to the son having his consultation'.
>
> So, the son came in and after about five minutes, the patient came in. Couldn't answer questions very directly, most of the answers I've got were from the son. When I asked him what time it was, he was orientated to the time and he knew that this was the hospital but I had to give him the option of whether is this the hospital, is this his house or is this a shopping centre. He didn't know who I was, what that I was a doctor or my nurse was that she was a nurse. So, because of that, I was a little

bit unsure but if I look at the history from, oh, the other part that I forgot to mention was that in December, October and December 2020, he had, there was a query of a diagnosis of dementia under GHKL, geriatrics unit there. But that was never followed up, I think they were waiting for letters from Tengku Mizan Hospital to give them the chronological order of what was happening. So, when I had this history, I thought that it may possibly be dementia but I need to rule out a subdural haematoma hence that I needed to rule out that he had a need, to make sure that he had no infection. So, I was waiting for his blood test to come back and the blood test, his white cells are normal. His retrosig sedimentation rate is normal as well. So, doesn't suggest that he has an infection anywhere.

So, I will have to investigate him which means do a memory test to make sure or to confirm a diagnosis of dementia in this case. So, I am awaiting a brain scan, a CT scan of his brain to make sure that there is no bleed in the brain, that's one that I am awaiting for. And I think the family had an appointment yesterday at Tengku Mizan Hospital so I had suggested that they do a brain scan there if possible. And see a psychiatrist there to get at least a letter to let me know what has been the chronological events that has been going on over the last few years' But I, myself have not assess the patient but from looking at the history, we may be dealing with a man with dementia but just looking at the history. I have not assessed him but speaking to him, he did seem a little bit confused, he did have some word finding difficulties. But seemed more confused and needed quite a lot of reassurance'.

LKL: But without putting words in your mouth, Dr. is it quite apparent to you from your exam, the examination you did have that you cannot say with confidence he would be able to give evidence in a Court situation?

Soraya: I don't think he will be able, I don't think so but —

...

LKL: So, based on the, what you were informed by the patient's son, Dr, can I just confirm with you the patient's son told you that these episodes started, the forgetfulness, the confusion, they started as far back as 2017? Or the patient, it was apparent this far back as 2017.

Soraya: Yes. But the son's, he only move in with the father in 2014 so he said that it started around 2017.

LKL: And can you just recall again when did the son first take his father to a hospital for some kind of assessment to a hospital. (00:25:48 in audible).

Soraya: I think yes, that's what he said in 2017, he's seen a psychiatrist at Tengku Mizan Hospital and started on Aricept which is a medication that we treat to delay the progression of memory loss in patients with dementia. But the son stopped it at that point because he thought that the father's condition was getting worse.

[23] Dr Soraya's evidence forced the eye-brow raising question whether or not D1 is capable of managing his affairs including instructing solicitors to act for him when OS 131 was instituted and in defending this action.

[24] Kennedy LJ in *Masterman-Lister v Brutton & Co, Masterman-Lister v Jewell and another* [2003] 3 All ER 162 said at [17]:

A

> ... courts should always as a matter of practice at the first convenient opportunity, investigate the question of capacity whenever there is reason to suspect that it may be absent ...

B

[25] That this is particularly important cannot be overemphasized as the court needs to be guided by medical evidence through the documents sought in the discovery order, whether there was substance to the allegation that D1 did not have the mental capacity to litigate as far back as 2017, which was allegedly concealed from the court in OS 131 and this court, which documents sought may lead to a train of inquiry to assist this court in determining conclusively and with finality the instant case. To this end, the 'unless order' was made.

C

[26] At this stage of the proceedings, the court is only concerned that the plaintiffs, D2 and D3's allegations of lack of mental capacity by D1 in managing his affairs is not a trivial complaint made by busybodies. A serious question did arise from Dr Soraya's evidence about D1's medical impediment (as opposed to being mentally disturbed under the Mental Health Act 2001). The court as such, has a duty to determine whether there is substance in the allegation.

D

E

[27] In *Goddard Elliot v Fritch* [2012] VSC 87, the Supreme Court of Victoria held:

> 563 *When the issue is properly raised, it is the duty of the court at the earliest opportunity to examine whether the person has the mental capacity which is required*. The principle is of long standing and was applied in the nineteenth century in Howell v Lewis. Faced with conflicting evidence about the state of mind of a party, Kekewich J (a judge of considerable authority) proceeded in this manner:
>
> > I have some evidence of weakness of intellect which I cannot disregard, and that evidence includes medical evidence; and I think I should be doing wrong if I were to say that the presumption which I have mentioned should prevail. *I think I must regard it as if there were a dispute, and I think that that dispute must be decisively settled before we can get on any further*. (Emphasis added.)

F

G

[28] Hence the necessity for the documents to be produced. Once the period of medical incapacity of D1 is ascertained, then the question of when he became incapable of instructing solicitors to act for him will impact the prievious litigation in OS 131; particularly whether there is capacity to litigate and whether D1's solicitors would have the authority to represent him in OS 131 and in the present proceedings until the representative was appointed after his death on 18 July 2021. Suffice to state that Dr Soraya has given sufficient medical evidence that prima facie, raise serious questions as to D1's mental capacity in managing himself and his affairs which this court cannot but be alive to the possibility whether D1 even understood the litigation proceedings or whether D1 or others were driving the litigation.

H

I

[29] In *Goddard v Fritch*, the court instructively said: A

548 Putting aside cases where a lawyer may have a special representative authority by operation of a particular law or enactment, a necessary corollary of these principles is that *the authority in law of a lawyer to represent a client depends on the client having the requisite mental capacity. The commencement of proceedings on behalf of a client implies the solicitor, as an officer of the court, is reasonably satisfied the client has that capacity*. It is the same when a barrister represents a client at court. In most cases, there will be nothing suggesting the matter should be considered and the lawyer can presume their client has mental capacity. In others, however, the lawyer will be on notice that the issu erequire sactive consideration ... B

549 *The mental capacity of a client to instruct is a reflection of that mental capacity which the client must have to participate in the legal proceeding*. As a lawyer is an officer of the court, it is their 'primary responsibility' to be reasonably satisfied that the client has the mental capacity to participate in the proceeding and to instruct. *Where the client does not have that capacity, the lawyer does not have the authority to represent them in the proceeding,* except for certain limited purposes, most particularly perhaps for the purpose of an inquiry into that question ... C D

550 *The lawyer's authority can only ever occupy that range which is marked out by the client's mental capacity. Their authority must end where that capacity ends*. As Fox J said in *Martin v Azzopardi*,'[i]f, and as soon as, the plaintiff was in [such a] condition he would be unable to retain a solicitor. That is to say, he would not have the mental capacity to understand the nature of the acts or transactions which he would be authorizing'. Consequences follow a breach of this principle. If the party lacks mental capacity and the solicitor knew or should have known, the solicitor is at risk of having to pay indemnity costs even in the absence of impropriety, as where the party is an infant and had to sue by their litigation guardian or next friend. A solicitor who persists with representing a client who has lost mental capacity is liable to have costs awarded against them on an indemnity basis even if there is no impropriety. The conduct of the proceeding by a lawyer on behalf of a client lacking this capacity is liable to be stayed on the same basis. By the same logic working in reverse, the authority of a court-appointed next friend may be challenged, and a proceeding issued by them dismissed, where the party is shown to be capable of managing their affairs. E F G

...

569 By these rules and principles, *a person having mental capacity can, but a person lacking mental capacity cannot, commence or defend legal proceedings*. The person lacking mental capacity must have a litigation guardian appointed (by whatever name). A lawyer must be reasonably satisfied that their client has the mental capacity to give instructions. If they are not so satisfied, they cannot act for or represent the client. They can only be, or act for and represent, the litigation guardian. *When a client loses mental capacity, their lawyer loses the authority to act for and represent them. If a person commences a proceeding with that capacity but loses it thereafter, their capacity to participate in the proceeding on their own behalf and instruct their lawyer to do so is also lost*. The lawyer loses their authority to act for and represent the party in those circumstances. Therefore, when it arises, the issue of the person's capacity to commence or participate in legal proceedings is a matter of the H I

first importance for the court and for the person's legal representative as an officer of the court.

At p 164:

563 ...

The same course was adopted in *Allregal Enterprises Pty Ltd v Carpaolo Nominees Pty Ltd*. Faced with an unrepresented person who appeared to be mentally ill, Pullin JA referred her to the Public Advocate for a capacity assessment and report. His Honour stated (or understated) this to be the applicable principle:

> *[I]f the court is put on notice by evidence that a person may not have the capacity to manage his or her own affairs, then in my opinion, the court is duty bound to decide whether the person does have capacity. To proceed without determining the issue means that the court is participating in what may be irregular proceedings*. (Emphasis added.)

[30] This principle at (65) in *Masterman-Lister* is also noteworthy:

> ... The pursuit and defence of legal proceedings are juristic acts which can only be done by persons having the necessary mental capacity; and *the court is concerned not only to protect its own process but to provide protection to both parties to litigation which comes before it* ...

[31] *Goddard v Fritch* also stressed the need to resolve the litigant's mental capacity to litigate a suit to prevent abuse of process and denial of natural justice:

> *Procedural implications*
>
> 566 *The responsibility of the court to determine whether a party has the requisite mental capacity can have important consequences for the conduct of legal proceedings by the court*. The position of a person compelled to participate in a hearing when mentally ill may be seen to be analogous with someone compelled to attend a hearing who cannot for reasons of legitimate physical illness or other reasonable explanation. A person who is physically ill or otherwise (reasonably) cannot attend the hearing has a strong claim to an adjournment. So also a person who is mentally ill but able to be physically present has a strong claim to an adjournment. As was held by Handley JA in *Murphy v Doman*, in both cases *there is a serious risk that the continuation of the proceeding by the court would be a denial of natural justice*.
>
> 567 *In consequence, when it is shown that there is sufficient concern about the capacity of a party to participate in legal proceedings, the court may need to adjourn the proceeding in order to examine that question. Where necessary, the court must consider these issues of its own motion*. One strong example is *Palmer v The Chief Executive, Queensland Corrective Services Commission*... Alternatively, where the evidence establishes that the want of capacity is likely to be temporary, the court can grant a short adjournment ... (Emphasis added.)

[32] In Malaysia, 'capacity to litigate' was discussed in *Lim Thian Hock @*

Lim Thiam Hock v Lim Choon Hiok [2014] 9 MLJ 1 where the High Court applied the test in the English Court of Appeal's decision in *Masterman-Lister* as follows:

> [34] The test formulated in *Masterman-lister*, can be applied to determine if the plaintiff is a patient within the meaning of O 76 as it is pari materia with the English provision. Applying the test, in order to determine whether a person has capacity to litigate, the court has to be satisfied that the person has the requisite mental abilities:
>
> (a) the ability to recognise a problem;
>
> (b) the ability to obtain and receive, understand and retain relevant information, including advice;
>
> (c) the ability to weigh the information (including that derived from advice) in the balance in reaching a decision; and
>
> (d) the ability to communicate that decision.

[33] Reverting back to the non-compliance, for starters, D1's representative did not say at the outset of the discovery proceedings that these documents did not exist. D1's contention that he does not have in his possession, custody or control the reports and diagnosis on the basis that they never existed is not convincing to me to justify the non-compliance by D1. It is imperative to note that in his affidavit in reply in encl 142 to oppose the discovery application, D1's representative did not say these documents did not exist, but instead raised issues on irrelevancy and that they were academic. When arguments were made on whether the 'unless order' should be made, there was not a whisper that these documents do not exist.

[34] Remarkably, D1's representative did not deny that he accompanied D1, his father to see Dr Soraya. I agree with D3's submission that the documents not furnished were within D1's representative's power to obtain.

[35] I find that D1's representative's learned counsel's reliance on *Lim Keong Yew & Anor v Tan Sri Lim Kok Thay & Anor* [2017] 1 LNS 1791 to be misconceived as that case concerns an application for discovery. Here, the decision to order discovery has already been made; the court has decided such order is necessary either for disposing fairly of the case or matter or for saving costs, and bearing in mind, that the cause of action of the plaintiffs pertain to the allegation of deception practised on the court through deliberate and conscious concealment of the relevant and material facts by D1 in OS 131. The documents sought to be discovered by D3 are as such relevant, necessary and crucial to determine the state of the D1's mental capacity or incapacity when taking out OS 131 and defending this action. The principles laid out in the case of *IOI Loders Croklaan Oils Sdn Bhd v LK Freight Services (M) Sdn Bhd & Ors* [2012] 3 MLJ 266 is sound but do not assist D1's case as I do not accept the reasons proffered by D1's representative for non-compliance.

[36] With due respect to D1's representative, since the discovery order has already been made and perfected, to now claim the reports sought and diagnosis do not exist is too late and unacceptable. Further, I have no jurisdiction to review the matter and any challenge to my decision lay by way of appeal to the Court of Appeal — *Hytec Information Systems Ltd v Coventry City Council* [1997] 1 WLR 1666.

[37] D1's solicitors also did not disclose the purported power of attorney in the instant proceedings up until 17 June 2021, in the thick of the trial, when they were evidently forced to do so in order to prevent and/or avoid calling D1 as a witness.

[38] The power of attorney produced midway by D1's representative's solicitors during trial in June 2021 giving power to Khoo Kiam Chong gives the court much pause for thought. I consider that when there are credible allegations of someone else running the litigation, it ill behoves D1's representative to decry that medical reports and diagnosis were not in existence and for that matter, Dr Soraya did in her letter of 6 September 2021 state that she could prepare the medical report but not in the short time frame given by the D1's representative's solicitors. By the time of the hearing on 15 October 2021, more than 1 1/2 months had elapsed since Dr Soraya's letter agreeing to render a report if given time.

[39] In my utmost respectful opinion, in so far as D1 was suffering any medical impediment, the documents sought to be produced were crucial as to D1's capacity to litigate, to the validity of the legal actions taken, and to defending himself in proceedings since 2017 till present. Although not delving into the merits of the claim at this stage, it is apposite to mention that refusal to produce will cause further delay in the trial and scuttle the trial dates fixed. It is noteworthy that the trial had to be adjourned a few times.

[40] It cannot be underscored enough nor disputed in the present case that:

(a) a peremptory order was made in unambiguous language to comply with the discovery that D1's representative had not complied with; and

(b) answers to D1's capacity to litigate by instituting OS 131 will have a direct bearing on this Court where the plaintiffs are seeking to set aside the impugned order made therein.

[41] As such, given the gravity that this court is duty bound as enjoined by clear principles set out in *Goddard v Fritch* and *Masterman-Lister* to investigate at the earliest opportunity the capacity or lack of to litigate, so as to 'protect its own process' and not participate in what may be irregular proceedings, in my judgment, the non-compliance of the 'unless order' is all the more egregious

and gave the impression that D1's representative had little or no respect for the order. Not only that, I find it significant that there was no application made for a stay of the discovery order. Without a stay, in my respectful view, D1's representative abdicated his right to refuse to comply.

[42] In my view, when evaluating the reasons for a breach of an 'unless order' considerations must be taken into account, in line with the principles enunciated by caselaw authorities.

[43] Firstly, as to whether the failure to comply was intentional and contumelious (see eg *Md Amin bin Md Yusof & Anor v Cityvilla Sdn Bhd* [2004] 4 MLJ 446). Peremptory orders are made to be obeyed — *Caribbean General Insurance Ltd v Frizzell Insurance Brokers Ltd* [1994] 2 Lloyd's Rep 32 per Legatt J.

[44] Disobedience to such an order would qualify as 'intentional and contumelious'.

[45] Here, the ability to comply with the 'unless order' is entirely within the control of D1's representative as for instance, Dr Soraya has offered to prepare the medical report but not by the dateline of 7 September 2021. However there was no response to this letter and no feedback from the solicitors for D1's representative. In any case, D1's representative did not even seek an extension of time for compliance, to at least demonstrate the seriousness and sincerity on his part.

[46] Fact of the matter is, the deadline for compliance was not extended by the court. The non-compliance is therefore inexcusable and the failure 'intentional and contumelious'.

[47] Secondly, as to whether there is a history of failure to comply with other orders (see *Hytec Information Systems*; *Md Amin bin Md Yusof & Anor v Cityvilla Sdn Bhd*), the history of litigation show in June 2021 itself, two unless orders were made. The trial date of 9 April 2021 was vacated for D1's then solicitors to sort out their authority to act. Trial was then fixed to continue on 10 June 2021. On 3 June 2021 an unless order (first unless order) was made that unless the application for the appointment of a litigation representative is filed before 29 June 2021, the court will make any order as the court deems fit including that judgment be entered against D1.

[48] Then, on 16 June 2021, Messrs Syed Ibrahim & Co the present solicitors filed for D1 a notice of change solicitors and two unaffirmed affidavits of Khoo Kiam Chong and Ruben Khoo Sheng Luen. In Khoo Kiam Chong's affidavit, he averred that he and his son, Ruben Khoo had been

A appointed by D1 to act as his attorneys pursuant to an alleged irrevocable power of attorney ('PA') dated 19 May 2016. The PA was contended to be made for valuable consideration and refers to a declaration of trust which D1 is said to hold 47.5% of his interest for Khoo Kiam Chong. It was alleged that the attorneys are duly authorised pursuant to the PA and given the power by D1to B have conduct of this matter. Khoo Kiam Chong alluded to him giving instructions for conduct of this matter since commencement and being the one who appointed Messrs Syed Ibrahim & Co as D1's solicitors. By letter dated 21 June 2021, D3's solicitors requested from Messrs Syed Ibrahim & Co to furnish them with a copy of the declaration of trust of D1 dated 13 May 2016, C a document which was referred to in the PA in exh 'DK1' of Khoo Kiam Chong's affidavit. By letter dated 23 June 2021, Messrs Syed Ibrahim & Co refused to provide the said declaration of trust and contended that it does not in any way affect the powers and conduct of the attorneys in pursuing this suit in the name and on behalf of the first defendant. D

[49] On 29 June 2021, this court held that the Powers of Attorney Act 1949 ('the Act') must be adhered to strictly and the PA must be authenticated in the appropriate form following what has been set out in the First Schedule of the E Act — see *Wan Salimah bte Wan Jaffar v Mahmood bin Omar (Anim bte Abdul Aziz, intervener)* [1998] 5 MLJ 162. The Schedule is to be read and construed as an integral, essential and operative part of the Act, see: *Lim Eng Chuan Sdn Bhd v United Malayan Banking Corp & Anor* [2013] 3 MLJ 161; [2013] 5 CLJ 425 (FC); and made a second 'unless order' that the legal representative must be F sorted out due to concerns arising from examination of Dr Soraya before next trial date of 5 August 2021. As Mr Mak was not in court on 8 April 2021, in the interest of justice, D1 was given a chance to appoint a legal representative. The court was aware it previously made an unless order but in the circumstances do not think there was intentional or contumelious flouting of the order. An G additional date for trial was fixed on 6 September 2021. At case management however on 22 July 2021, Mr Mak informed that D1 had passed away on 18 July 2021. As a result, the trial date of 5 August 2021 was vacated for Mr Mak to update on instructions. The trial date of 6 September 2021 was maintained in the meanwhile.

H

[50] Thirdly, as to whether the other parties contributed to the failure by D1's representative — see *United Malayan Banking Corp Bhd v Palm and Vegetable Oils (M) Sdn Bhd & Ors* [1994] 3 MLJ 73, I do not find evidence of the plaintiffs and/or D2 and/or D3 contributing to the delay.

I

[51] Lastly, I deal with whether D1's representative had made positive efforts to comply but was prevented from doing so by extraneous circumstances see — *Hytec Information Systems*. As stated above at (41)–(43), there were clearly no extraneous circumstances that prevented D1's representative to adhere to his

responsibility to comply with the discovery order and 'unless order'. There is simply no satisfactory evidence of positive efforts made by D1's representative working towards ensuring compliance with the 'unless order'. Instead, his solicitors' non-response to Dr Soraya's offer of 6 September 2021 and letter dated 23 September 2021 purportedly defining for the Tuanku Mirzan Hospital what are medical reports as opposed to medical records, strongly suggested otherwise.

[52] I have taken into account all the breaches and non-compliance by D1 or his representative at the time of evaluation of D1's representative's failure before deciding whether to strike out D1's defence and enter judgment for the plaintiffs. Ultimately each case must be decided on its own facts. It cannot be overemphasized enough that the 'unless order' made on 21 September 2021 was to ensure that the discovery order is complied with promptly, and not abused.

[53] I therefore agree with the submission of the respective counsel for D3, D2 and the plaintiffs that this neglect or refusal to comply can be equated to wilfulness.

[54] I find there is also no tenable basis for the allegation that the learned counsel for D3 in pushing so hard for the documents, sought to run the case for the plaintiffs. Granted that the plaintiffs have closed their case, in my view, there is nothing to stop the plaintiffs from relying on evidence adduced/to be adduced by the defendants. The defendants in this case have not put any witness on the stand yet. In *Tan Kah Khiam v Liew Chin Chuan & Anor* [2007] 2 MLJ 445, the Court of Appeal held at p 450–451:

> In a civil case, one party's evidence is the other's as well. So, a plaintiff may rely on the defendant's evidence to prove his or her case. The converse is also true (see the observations of Hashim Yeop A Sani SCJ in *M Mahadevan v S Lourdenadin* [1988] 2 MLJ 371).

[55] In my view, it is imperative that the courts, in performing its judicial functions should not to be too ready to excuse the failure of parties to comply with 'unless orders' for the simple reason that obedience to such orders is the very reason why the 'unless order' is made in the first place. On the facts, the non-compliance here in my respectful view, gave rise to a substantial risk that it was not possible to have a fair trial.

[56] The sanction for failure to comply with a discovery order is set out in O 24 r 16. Taken as a whole, I reiterate that the conduct of D1's representative or those running the litigation suggest an evident disregard on their part for the authority of the court and the 'unless order'.

A **[57]** In this case, I find that the consequence of striking out D1's defence will commensurate with and is proportionate to the failure in question. Lest an 'unless order' remains just a slogan and to be flouted with impugnity. An 'unless order' being an order of last resort, failure to comply would ordinarily activate the sanction it imposed — *Hytec Information Systems*.

B

[58] Accordingly, after taking into account the facts and circumstances of the case and applying the principles established by caselaw authorities, I exercised my discretion under O 24 r 16(1) of the ROC 2012 to strike out D1's defence and entered judgment for the plaintiffs on terms as follows with costs, and costs to D2 and D3:

C

(a) that the order obtained on 21 May 2019 by the first defendant in Kuala Lumpur High Court Originating Summons No WA- 24NCC-134–03 of 2019 is declared to have been obtained by fraud and/or dishonesty by the first defendant;

D

(b) that the order obtained on 21 May 2019 by the first defendant in Kuala Lumpur High Court Originating Summons No WA- 24NCC-131–03 of 2019 is impeached and set aside in totality and High Court Originating Summons No WA-24NCC131–03 of 2019 is struck off and/or set aside in totality;

E

(c) the first defendant's action of filing the High Court Originating Summons No WA24NCC-131–03 of 2019 amounts to an abuse of process and struck off and/or set aside;

F

(d) general damages to be assessed against the first defendant;

(e) interest to accrue at the rate of 5%pa on such damages as may be assessed and awarded by this honourable court from the date of judgment till the date of full and final settlement of the same;

G

(f) first defendant to pay costs of RM75,000 to the plaintiffs subject to allocator;

(g) first defendant to pay costs of RM30,000 to D2 subject to allocator; and

H

(h) first defendant to pay costs of RM40,000 to D3 subject to allocator.

[59] I am fortified in taking this course of action as the terms of the 'unless order' enabled the court to impose sanctions for non-compliance with those directions and read together with O 24 r 16(1) of the ROC 2012. In exercising my discretion, I am of the respectful view that on the facts, the overarching ends of justice will be better served by striking out D1's defence and entering judgment for the plaintiffs. The powers accorded the court pursuant to O 24 r 16(1) of the ROC 2012 order was not inserted by the rules committee for cosmetic purposes.

I

[60] Not only that. I also hold the view that courts have to be firm with litigants in order to prevent the efficient administration of justice from being derailed and, to ensure that dilatory parties do not willy nilly disregard timelines laid down for the conduct of litigation. In the immutable interest of justice, the court must stay in the 'driver's seat', not allow a culture of delays to fester and stultify a just and expedient disposal of cases in the courts' dockets and, to send a clear message that court orders are made to be complied with.

D1's defence struck out and plaintiffs granted judgment.

Reported by Ashok Kumar